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Supreme Court, U.S.
FILED
SEP 23 1991
OFFICE OF THE CLERK

NO. 90-1836

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

HETTIE M. MINNICKS
as Executrix of the Succession
of Stephen A. Mistich
Petitioner,

versus

BRANDON L. MISTICH,
REBECCA MISTICH TERRASE,
and PATRICIA MONROE MISTICH, as natural tutrix
of SHAWN A. MISTICH
Respondents.

ON PETITION FOR WRIT
OF CERTIORARI TO THE LOUISIANA COURT
OF APPEAL, FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT

Petitioner wishes to reply to five points made in the Brief of Respondents in Opposition to the Petition, and to bring a recent development to the attention of the Court.

1.

The Respondent's Opposition is based on the erroneous assumption that this Honorable Court has already ruled on the same issue presented in the Petition now before this Court. Before this Court previously was the June 1, 1990 denial by the Louisiana Court of Appeal, Fourth Circuit, of the executrix's motion to be substituted as proper party plaintiff-appellee. Now before this Court is the December 22, 1990 denial by the same Court of Appeal of the executrix's Petition of Intervention for the decedent's estate as the substantive beneficiary in interest of the decedent's own final judgment.

Respondents mischaracterize the prior substitution ruling as being the same "issue" as the present substantive intervention ruling. See present Opposition, pages i, ii, vi, 3, 4, 5, 6. Yet in Respondents' prior Opposition (in U.S.S.Ct. No. 90-1082), page vi, they had stated the prior state court ruling "involved merely the procedural substitution of parties" and, on page 11, they had said "it is the denial of this procedural substitution alone that is before this Court." Also Respondents had stated that the substantive beneficiary issue was a "new issue" not addressed by the courts below." (prior Opposition, page 5). The Respondents squarely contradict themselves by now arguing that this substantive beneficiary issue has already been decided!

Although Petitioner for the sake of completeness previously had included arguments concerning the substantive beneficiary issue, Petitioner noted to this Court in her prior Petition that the substantive intervention had been filed and, in her prior reply brief, that the Court of Appeal had denied the intervention. Evidently since the Louisiana Supreme Court had not then ruled

on the expressly substantive intervention, this Court declined to grant writs at that time.

2.

Throughout the Opposition Respondents continue to mistakenly treat this case as a survival case. Respondents state "under *Connors v. Gallick*[1] and all relevant state and federal law, the action *survives* for the benefit of decedent's children." (Opposition, page 9, emphasis added). The Respondents erroneously assume that the decedent's death after final judgment converted his personal injury judgment into a survival cause of action for them.

On pages 8 and 9 of their Opposition, Respondents attempt to distinguish the *Connors* decision because the judgment there had been settled and so the original personal injury litigation was no longer pending *at the time of the decision*. However it is not the time of the decision which is relevant. Rather it is the time of the tort victim's death in relation to the time of the final personal injury judgment. On this point, the present case is the same as *Connors*, since in both cases final judgments were entered before the victims' deaths (but while litigation was pending, there being a motion for a new trial or an appeal filed).

Thus the *Connors* decision and the present case are based upon the distinction between a personal injury cause of action by the victim himself, and a survival cause of action. In this regard the *Connors* court stated:

> Gallick's cause or causes of action having been merged in his judgment....Gallick's death did not convert his judgment into a cause of action to be prosecuted for the benefit of his [survival beneficiaries]....[T]he *only* event that could give [the survival beneficiary] any right would be the granting of a new trial.

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[1] 339 F.2d 381 (6th Cir. 1964).

339 F.2d at 386. (emphasis added). No such event such as the granting of a new trial or a reversal of the judgment has occurred herein.

Note the court in *Connors* expressly disagreed with the Respondents' position herein. After stating that if the judgment were reversed and a new trial granted after the victim's death, then there would be a survival action, the court continued:

> [P]laintiff's position is that Gallick's death at a time when his judgment might have been set aside[,] if the pending motion for new trial were granted[,] had identical results.
>
> *We are unable to agree with plaintiff's position.*

339 F.2d at 385, 386 (emphasis added).

3.

The Respondents state "that there is no federal issue involved here, much less any conflict with federal decisions." (Opposition, page 10). However the long-standing jurisprudence cited in the Petition refutes this statement. This jurisprudence continues in the very recent case of *Associated Electric Cooperative, Inc. v. Mid-America Transportation Co.*, 931 F.2d 1286 (8th Cir. 1991), holding federal maritime law, not contrary state law, applicable to the effect of a settlement on the substantive rights of contribution or indemnity between joint tort-feasors.

4.

Respondents mistakenly claim that Petitioner "conceded" that state procedural law controlled the substitution of parties (Opposition, page 2). Yet a reading of Petitioner's memorandum to the state Court of Appeal shows Petitioner argued that *both* federal and state law provided that she, as executrix, was the proper party to be substituted. See prior Opposition, Appendix

3. Petitioner's subsequent writ application to the Louisiana Supreme Court also argued that *both* federal and state law required her substitution. (See prior Reply Brief of Petitioner, Appendix, page A-2).

5.

Respondents discuss the relevancy of the deceased plaintiff's will (Opposition, page 4). Petitioner is quoted from her opposition to the defendant-appellant's motion for a stay of the appeal, which motion had relied upon the will as a reason for granting a stay. The point being made by Petitioner was that the decedent's testacy or intestacy was not relevant to determining that his executrix was the proper party to be substituted. In either case the judgment rights belonged to the estate.

6.

A recent development should be brought to this Court's attention. As discussed on page 23 of the Petition herein, under the law of California, where the decedent was domiciled, the right to a judgment in favor of a plaintiff who died pending an appeal belongs to the plaintiff's estate. The judgment herein was inventoried on November 6, 1989 as part of the estate in the California probate proceeding. Recently, on July 29, 1991, after notice to the Respondents herein, the California court issued a order holding that the decedent's personal injury judgment "*is properly an asset of the estate and subject to the decedent's testamentary disposition*" (emphasis added; see Appendix, page A-1). Thus the Louisiana state court's ruling conflicts, not only with federal maritime law, but also with the law and court order of the State of California, the situs of the incorporeal moveable property right represented by the decedent's judgment.

CONCLUSION

For all the reasons expressed by Petitioner, the Opposition of Respondents is ill-founded. So this Court should order summary reversal or grant certiorari to protect the substantive rights of the deceased seaman and to preserve the constitutional uniformity of federal maritime law.

APPENDIX

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

Estate of:	)	Case Number: A 148591
	)	
STEPHEN ARTHUR MISTICH,	)	Order Settling First
	)	Account Current And
	)	Report Of Executor And
Decedent.	)	Order For Its Settlement
	)	

Petitioner, HETTIE MINNICKS, as executor of the Will of STEPHEN A. MISTICH, deceased, having filed her First Account Current and Report of Executor and Petition for its settlement, and the same, as supplemented, having come on regularly for hearing on July 24, 1991 in Department 3 of the above entitled Court, the Honorable *TULLY H. SEYMOUR*, Judge/ Commissioner presiding, the court now finds:

1. *That all notices of said hearing have been given as required by law.*

2. All acts and transactions of the petitioner, HETTIE MINNICKS, during the period of the report are truly shown and should be approved, and all allegations of the report and Petition for its settlement are true.

3. That the First Account Current for the period of August 24, 1989 through and including April 18, 1991 is full, true and correct and should be settled, allowed and approved as filed.

4. *That the decedent died testate on May 14, 1989, a resident of the State of California, County of Orange.* That decedent's Will, dated March 3, 1989, was admitted to Probate

by order of this Court on August 24, 1989 and that the petitioner qualified as executor thereof and Letters Testamentary were issued to her on September 6, 1989. At all time since, the petitioner has been, and now is, duly appointed, qualified and acting as executor of decedent's will.

5. That notice to creditors has been published for the period and in the manor prescribed by law. All known and reasonably ascertainable creditors of the estate have received notice and the time for filing claims has expired.

One creditor's claim has been filed and presented to the estate, has been accepted and paid.

6. The debts of the decedent, including costs of administration through the account period, funeral expenses and expenses of last illness have been paid and the estate is now and at all times has been solvent.

7. *The Inventory and Appraisement of the estate as returned and filed November 6, 1989, is a true and correct report of the estate's assets.*

8. All appropriate tax returns have been filed to date.

9. The estate's assets consist solely of the separate property of decedent.

10. The transaction and acts as reported by the petitioner, pursuant to paragraph 13 of the Report and Petition for Settlement, are accurately shown and should be approved ratified.

11. *The Judgment of Stephen A. Mistich vs. Pipelines, Inc., et al, Number 29-703, is properly an asset of the estate and subject to the decedent's testamentary disposition.*

THEREFORE, it is ordered and judged that:

1. The First Account Current be settled, allowed and approved;

2. All acts and proceedings of the petitioner as disclosed in the First Account Current and Report, as supplemented, be

confirmed, ratified and approved;

3. *That the assets of the estate, as set forth in the First Account Current and Report of the estate are assets of this estate and subject to testamentary disposition in this proceeding;*

4. That the estate shall be brought to a close within twelve (12) months of the date of this order or a further status report shall be filed by said date.

Dated: July 29, 1991

(Signed) Tully H. Seymour
JUDGE/COMMISSIONER OF THE
SUPERIOR COURT

[emphases added]